Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

No. 98-713

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRONTIER PACIFIC INSURANCE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DEBRA A. VALENTINE
General Counsel

JOHN F. DALY
Assistant General Counsel

LAWRENCE DEMILLE-WAGMAN
Attorney
Federal Trade Commission
Washington, D.C. 20580

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission, having obtained a judgment for restitution against a telemarketer, has the authority to enforce that judgment against a bond posted by the telemarketer pursuant to a state regulatory scheme.

2. Whether the Federal Trade Commission violates the Tenth Amendment when it enforces a judgment against a bond posted pursuant to a state regulatory scheme.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Commissioner v. *Estate of Bosch*, 387 U.S. 456 (1967)	7
FTC v. *Dean Foods Co.*, 384 U.S. 597 (1966)	6
FTC v. *Gem Merchandising Corp.*, 87 F.3d 466 (11th Cir. 1996)	4
FTC v. *Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994), cert. denied, 514 U.S. 1083 (1995)	4
FTC v. *Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991)	4
FTC v. *World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988)	4
Haring v. *Proisie*, 462 U.S. 306 (1983)	7
Kokkonen v. *Guardian Life Ins. Co.*, 511 U.S. 375 (1994)	5
New York v. *United States*, 505 U.S. 144 (1992)	6
Peacock v. *Thomas*, 516 U.S. 349 (1996)	5
Ragan v. *Merchants Transfer Co.*, 337 U.S. 530 (1949)	7

Constitution, statutues and rule:

U.S. Const. Amend. X	6, 7
All Writs Act, 28 U.S.C. 1651	6
Federal Trade Commission Act, § 5, 15 U.S.C. 45	2, 4, 6
Cal. Bus. & Prof. Code (West 1997):	
§ 17200	2
§ 17203	2

Statutues and rule—Continued: Page

Telephonic Sellers Act, Cal. Bus. & Prof. Code
§ 17511 *et seq.* 2, 3, 6, 7
§ 17511.2(d) 3
§ 17511.12(a) 2
§ 17511.12(c) 3
§ 17511.12(c)(2) 3
Fed. R. Civ. P. 69(a) 5

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-713

FRONTIER PACIFIC INSURANCE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 149 F.3d 1036. The opinion of the district court (Pet. App. 12a-13a) is unreported.

JURISDICTION

The opinion of the court of appeals was entered on July 20, 1998. The petition for a writ of certiorari was filed on October 19, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 7, 1996, the Federal Trade Commission (FTC or Commission) filed a complaint in the United States District Court for the Central District of Califor-

nia against MTK Marketing (MTK), Copy Resource Center (CRC), and 13 other defendants. The complaint alleged that the defendants had violated Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45, by telephoning customers of other suppliers, falsely claiming to be the customer's usual supplier of toner, falsely claiming that the price of toner had just increased or was about to increase, and by shipping and demanding payment for toner that customers had not actually ordered. The complaint sought injunctive relief and redress for consumers injured by the defendants' conduct. Gov't C.A. Br. 3-4; Pet. App. 4a.

On August 5, 1996, the district court entered a stipulated final judgment against nine of the defendants. On September 18, 1996, the court entered a default judgment against MTK, CRC, and the remaining four defendants. The default judgment enjoined those six defendants from engaging in telemarketing. In addition, the court ordered MTK to pay $1,335,093 in consumer redress and ordered CRC to pay $494,856 in redress. Gov't C.A. Br. 4-5; Pet. App. 4a. No appeal was taken from those final judgments.

2. California's Telephonic Sellers Act, Cal. Bus. & Prof. Code §§ 17511 *et seq.* (West 1997), regulates the practices of California telemarketers such as MTK and CRC. The Act requires telemarketers to post a $100,000 bond "for the benefit of any person suffering pecuniary loss" resulting from the telemarketer's "unlawful, unfair or fraudulent business act or practice." *Id.*, §§ 17511.12(a), 17203, 17200. On July 3, 1995, MTK and CRC jointly posted the bond with petitioner Frontier Pacific Insurance Co. Gov't C.A. Br. 7; Pet. App. 4a.

3. Neither MTK nor CRC had sufficient assets to satisfy the judgment against them. On November 8,

1996, the FTC therefore filed a motion with the district court to enforce the bond they had posted. As required by the Telephonic Sellers Act, the FTC served its motion on petitioner. Cal. Bus. & Prof. Code § 17511.12(c) (West 1997). Petitioner opposed the motion. It argued, *inter alia*, that the FTC lacked jurisdiction to enforce the bond, and that the FTC was not a "person" (as that term is defined in the Telephonic Sellers Act) entitled to enforce a bond. Gov't C.A. Br. 8-9; Pet. App. 4a-5a.*

On December 6, 1996, the district court denied the FTC's motion. Pet. App. 12a-13a. The court held that the FTC does not fall within the Telephonic Sellers Act's definition of "person" and therefore "is not a proper party to this motion." *Id.* at 13a.

4. The court of appeals reversed. Pet. App. 1a-11a. The court first held that the FTC is a "person" within the meaning of the Telephonic Sellers Act. The court observed that "ample precedent supports the position that the term 'person' may include a governmental agency." *Id.* at 7a. It noted that "evidence in the record indicates that the Attorney General of California believes that FTC enforcement would serve the Act's purpose; his interpretation is entitled to deference." *Id.* at 7a-8a. The court also concluded that FTC enforcement would serve the purposes of the Act by expanding the group of people entitled to benefit from the bond. *Id.* at 9a.

---

* The Act provides that bonds may be enforced by "the [California] Attorney General, district attorney, city attorney, or any other person who has obtained a judgment for restitution against the seller." Cal. Bus. & Prof. Code § 17511.12(c)(2) (West 1997). The term "person" is defined to "include[] an individual, firm, association, corporation, partnership, joint venture, or any other business entity." *Id.*, § 17511.2(d).

The court also rejected petitioner's contention that permitting the FTC to enforce the bond is inconsistent with the Tenth Amendment. The court explained that

> allowing FTC enforcement would not compromise the State of California's sovereignty in any way. In fact, FTC enforcement would assist the State of California in furthering the policy interests the Act was designed to serve. Moreover, although the Tenth Amendment precludes the federal government from commandeering a state by forcing it to enact or enforce a federal regulatory program, no such conduct occurred here.

Pet. App. 10a (citation omitted). Finally, the court held that the FTC Act grants the agency the power to obtain ancillary relief from law violators and to enforce a favorable judgment against assets in the hands of third parties. *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. When the FTC brings a district court action to enforce Section 5 of the FTC Act, the court has "the authority to grant any ancillary relief necessary to accomplish complete justice." *FTC* v. *Pantron I Corp.*, 33 F.3d 1088, 1092 (9th Cir. 1994), cert. denied, 514 U.S. 1083 (1995); see also *FTC* v. *Gem Merchandising Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) ("the court's authority to exercise full equitable powers is especially appropriate" in an action enforcing Section 5); *FTC* v. *Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991); *FTC* v. *World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988). Petitioner does not

contest the FTC's authority to obtain a judgment for consumer redress against MTK and CRC. Petitioner contends, however, that the Commission lacks authority to pursue that judgment against an asset, such as the bond posted with petitioner, that is not in the hands of the wrongdoer. Pet. 5-6. That claim is without merit.

As this Court has recognized, a federal court may exercise ancillary jurisdiction to enable it "to function successfully, that is to manage its proceedings, vindicate its authority, and effectuate its decrees." *Peacock* v. *Thomas*, 516 U.S. 349, 354 (1996) (quoting *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 379-380 (1994)). A federal court has

> inherent power to enforce its judgments. Without jurisdiction to enforce a judgment entered by a federal court, "the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." *Riggs* v. *Johnson County*, 6 Wall. 166, 187 (1868). In defining that power, we have approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments—including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances.

Peacock, 516 U.S. at 356. That inherent authority is also recognized by Federal Rule of Civil Procedure 69(a), which "permits judgment creditors to use any execution method consistent with the practice and procedure of the State in which the district court sits." *Peacock*, 516 U.S. at 359 n.7.

In *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966), this Court held that various "ancillary powers" not specifically conferred on the FTC by statute—including the power to "bring contempt actions in the appropriate court of appeals when the court's enforcement orders were violated"—"have always been treated as essential to the effective discharge of the Commission's responsibilities." *Id.* at 607. See also *id.* at 608 (Congress has not "withdrawn from the Commission its inherent standing as a suitor to seek" relief generally available to litigants under the All Writs Act). Such "ancillary powers" include the authority to enforce a judgment obtained in an action brought by the Commission pursuant to Section 5 of the FTC Act. The court of appeals therefore correctly held that the FTC had authority to seek enforcement of the bond posted with petitioner by MTK and CRC. Petitioner identifies no contrary ruling from any court, nor any other reason why this issue warrants further review.

2. Petitioner also contends (Pet. 6-10) that the FTC's enforcement of a bond mandated by California law intrudes on the State's sovereignty in violation of the Tenth Amendment. That claim lacks merit. This Court has held that the federal government violates the Tenth Amendment when it forces a State to enact or enforce a regulatory program. *New York* v. *United States*, 505 U.S. 144, 161 (1992). California's enactment of the Telephonic Sellers Act, however, was not the product of any federal compulsion. Nor does the FTC's enforcement of the statutory bond intrude upon state sovereignty or subvert the purposes of the California law. To the contrary, the Commission's action furthers California's interests by providing redress to consumers injured at the hands of telemarketers covered by the Act.

The court of appeals thoroughly examined the text and history of the Telephonic Sellers Act (Pet. App. 5a-9a) and concluded that the FTC is a "person" entitled to enforce the bond under the terms of the statute. That holding was supported by, *inter alia*, "evidence in the record indicat[ing] that the Attorney General of California believes that FTC enforcement would serve the Act's purpose." *Id.* at 7a-8a. The court's construction of the Telephonic Sellers Act raises a question of state law that is not suitable for this Court's review. See, *e.g.*, *Haring* v. *Proisie*, 462 U.S 306, 314 n.8 (1983) ("standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review"); *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 462 (1967) (this Court "ordinarily accept[s] the determination of local law by the Court of Appeals") (quoting *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530, 534 (1949)). In light of the court of appeals' resolution of that interpretive issue, petitioner's Tenth Amendment claim is insubstantial. The Commission cannot plausibly be said to "commandeer" (Pet. 8) or "conscript" (Pet. 9) the resources of a state government by invoking remedial provisions that the State has freely chosen to make available to federal entities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DEBRA A. VALENTINE
General Counsel
JOHN F. DALY
Assistant General Counsel
LAWRENCE DEMILLE-WAGMAN
Attorney
Federal Trade Commission

DECEMBER 1998